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No. 86-285

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. DOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DONALD A. CARR
JAMES C. KILBOURNE
ROBERT L. KLARQUIST
JOHN T. WEBB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the court of appeals properly determined that the evidence adduced at trial was sufficient to affirm petitioner's conviction under the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, for possessing and transporting peregrine falcons contrary to Montana law.

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OPINION BELOW

The decision of the court of appeals (Pet. App. A1-A20) is reported at 786 F.2d 1440.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1986, and a petition for rehearing was denied on June 24, 1986 (Pet. App. A21). The petition for a writ of certiorari was filed on August 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, and of Montana law are reproduced at Pet. 4-6.

STATEMENT

Following a three-year undercover investigation by the United States Fish and Wildlife Service into illegal trafficking in raptors,[1] petitioner and two co-defendants, Burt Loessberg and Greg Moore, were indicted on three counts in the United States District Court for the District of Montana. Count One charged all three with conspiracy to violate the Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A) and 3373(d)(1)(B), by transporting, receiving, acquiring, and purchasing peregrine falcons in interstate commerce in violation of Montana law. Counts Two and Three charged petitioner and Moore with violating the Lacey Act Amendments of 1981 and the Endangered Species Act, 16 U.S.C. 1538(a)(1)(E) and 1540(b)(1). After a jury trial, petitioner was convicted on Counts Two and Three and sentenced to one year's probation and a $5,000 fine (Tr. 1547-1548).[2] The court of appeals affirmed petitioner's conviction under Count Two, the Lacey Act, but reversed his conviction under Count Three, the Endangered Species Act; it denied his petition for rehearing.

1. The Lacey Act makes it unlawful to transport, sell, receive, acquire, or purchase in interstate commerce any wildlife taken, possessed, transported, or sold in violation of state law. 16 U.S.C. 3372(a)(2)(A). The felony provision of the Lacey Act, of which petitioner was convicted, requires the government to prove that the defendant knew that the wildlife involved was illegally taken, possessed, transported or sold. 16 U.S.C. 3373(d)(1)(B).[3] The Montana state law underlying petitioner's conviction makes it

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[1]Raptors are birds of prey, such as falcons, hawks, eagles, ospreys, and owls. Mont. Code Ann. § 87-5-202 (1985).

[2]Petitioner was acquitted on Count One; his co-defendants were acquitted on all counts.

[3]In contrast, the misdemeanor provision imposes culpabililty upon proof that the defendant in the exercise of due care should have known of the illegality of his trafficking in the wildlife involved. 16 U.S.C. 3373(d)(2).

unlawful knowingly to purchase, possess, or transport raptors except pursuant to a certificate, license, or permit issued by the Montana Department of Fish, Wildlife, and Parks. Mont. Code Ann. §§ 87-5-201, 87-5-203, 87-5-206(4) (1985).

2. The evidence adduced at trial showed the following. Petitioner, a Texas physician who breeds falcons in captivity, set out to acquire wild falcons with co-defendants Burt Loessberg, a falconer, and Greg Moore, a veterinarian (Pet. App. A2). In 1982, Loessberg met and befriended John McPartlin, the government's confidential informant,[4] at a falconry meet (*id.* at A2-A3; Tr. 259).[5] In 1984 Loessberg, in his role as intermediary, told McPartlin that petitioner and Moore were interested in purchasing peregrine falcons (Pet. App. A3). During a visit to McPartlin's house, Loessberg reiterated petitioner's desire to purchase peregrine falcons and stated that the birds "did not have to be 100 percent legal" as long as they had a federal band and paperwork "to cover them" (Tr. 271).[6]

McPartlin told Loessberg that he would obtain wild illegal anatum[7] peregrine falcons and mark them with federal bands to misrepresent that he had bred them in captivity (Pet. App. A3). McPartlin repeatedly stressed to Loessberg

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[4]The court of appeals' summary of the evidence indicates that the intent to acquire wild birds originated with petitioner, not the informant (Pet. App. A2-A4). Although petitioner suggests (Pet. 18-19, 33-35) that he was entrapped, no such claim is fairly included within the questions presented (see Sup. Ct. R. 21.1(a)). In any event, he did not preserve any such contention in the court of appeals (Pet. App. A6-A7). It is thus not properly before this Court.

[5]Tape recordings of conversations between McPartlin and the co-defendants were played at trial and admitted into evidence (Pet. App. A7).

[6]McPartlin testified that this expression meant a subterfuge, to make a raptor acquired illegally appear to be legal (Tr. 271).

[7]See page 6, *infra*.

that petitioner must know how the birds were being "covered" (Tr. 316). McPartlin testified that he wanted petitioner to know that the birds were illegal and would be "covered in the sense that bands and paperwork would be used as a subterfuge to [dis]guise the illegal aspect of those birds" (Tr. 316).

On May 8, 1984, McPartlin talked directly to petitioner for the first time (Pet. App. A3; GX 4). Petitioner said that he had spoken with Loessberg and was aware that there was some problem with the "parentage" of the birds (Pet. App. A3; Tr. 329). McPartlin told petitioner that he was taking the birds out of a nest in the wild, not from his breeding project, and explained specifically that the sale of wild falcons is illegal in Montana (Tr. 330, 334). Petitioner confirmed the price with McPartlin, and promised to pay in cash (Tr. 335-336).

Petitioner and Moore spoke directly to McPartlin several times during the following month to arrange the details of the purchase (Pet. App. A4). Moore ultimately agreed to buy a wild passage[8] female peregrine falcon that was hatched in 1983, but would be falsely identified as a captive-bred peregrine falcon hatched in 1984 (Tr. 345, 354). McPartlin advised Moore to "keep her low" and not allow other people to see her "because anybody with any knowledge of peregrine falcons would realize that [the bird] was not a 1984-hatch peregrine falcon" (Tr. 356).

On June 2, 1984, petitioner flew from Texas to Montana to purchase two falcons, one for himself and one for Moore (Pet. App. A4). McPartlin and an undercover agent of the United States Fish and Wildlife Service, posing as McPartlin's accomplice, showed petitioner the falcons he was

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[8]A "passage" bird is a bird trapped during its first migration during the fall or winter (Tr. 337).

purchasing—a chick and an older, 1983-hatch passage bird.[9] McPartlin also showed petitioner the Montana raptor export permits that he had obtained, purportedly to serve as the "cover." The permits stated that McPartlin was authorized to export 1984-hatch captive-bred falcons to petitioner and Moore, respectively. Petitioner himself banded the older bird with a yellow band marker that incorrectly identified the falcon as captive-bred (Tr. 367).[10] As petitioner banded the bird, McPartlin again reminded him that the scheme was illegal (Pet. App. A4; Tr. 367-368, 752).

Petitioner returned to Texas with both birds and was arrested several weeks later (Pet. App. A4).

3. At the close of the evidence offered by the government, petitioner moved for judgment of acquittal on Count II, the Lacey Act count, alleging, inter alia, that the evidence was insufficient to support his conviction (Tr. 895-896). The motion was taken under advisement (Tr. 911). Petitioner renewed his motion at the close of all the evidence (Tr. 1491), and the court again reserved its decision (Tr. 1493). The motion was denied when the court entered the conviction, and petitioner appealed (Tr. 1522; Pet. 3).

4. The court of appeals affirmed in part and reversed in part. In upholding petitioner's Lacey Act conviction, it rejected petitioner's claim that there was insufficient evidence that petitioner knew his possession and transportation of the falcons was unlawful under Montana law. Petitioner argued, as he does in this Court, that he had permits from the proper Montana state agency authorizing the

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[9]These birds were taken from the wild by other subjects of the investigation (Tr. 387-388), not—as petitioner asserts (Pet. 19)—by government agents.

[10]Captive-bred birds must be banded when they are two weeks old. 50 C.F.R. 21.30(d)(3)(ii).

possession and transportation of the falcons purchased from McPartlin, so his subsequent possession and transportation of them could not be unlawful (Pet. App. A13-A14). The court of appeals concluded that the jury had a rational basis for rejecting petitioner's argument (*id.* at A14): petitioner participated in the scheme to "cover" the transaction, knowing that the origin of the birds was misrepresented (*ibid.*). In fact, he was reminded several times by the participants that the transaction was illegal (*ibid.*).

In reversing petitioner's Endangered Species Act conviction, however, the court of appeals held that there was insufficient evidence in one narrow respect: the government had not proved that the falcons in the instant case were anatum peregrine falcons (Falco peregrinus anatum), a subspecies of peregrine falcons listed as endangered (Pet. App. A20).[11] The court held that the birds' features alone did not conclusively establish the falcons as anatum peregrines, and evidence that conclusively identified the subspecies type (the location where the birds were taken from the wild) was in this case impermissible hearsay.

The court of appeals denied petitioner's rehearing request without opinion. The government did not request rehearing on the reversal of the Endangered Species Act conviction.

ARGUMENT

Petitioner contends in this Court that the court of appeals erred in rejecting his arguments concerning the sufficiency of the evidence to support the Lacey Act conviction. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is not warranted.

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[11]Not all species of peregrine falcons were listed as endangered at that time. 50 C.F.R. 17.11 (1983).

1. Petitioner contends (Pet. 18-30) that the court of appeals' conclusion that the evidence was insufficient to support his Endangered Species Act conviction also requires reversal of his Lacey Act conviction, because both counts were based on the same hearsay evidence. The elements of the offenses charged under the two Acts are, however, quite distinct. It is therefore illogical to conclude, as petitioner urges (without supporting authority), that reversal of one count requires reversal of the other. Moreover, petitioner is simply incorrect in asserting that the "same evidence" found insufficient to affirm his Endangered Species Act conviction was used to affirm his Lacey Act conviction.

The proper inquiry when reviewing the sufficiency of evidence to support a jury's verdict was summarized in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (footnote omitted; emphasis in original):

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. * * * This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the fact finder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

See also *United States* v. *Powell*, 469 U.S. 57, 67 (1984).[12]

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[12]This Court has often noted limitations on appellate review when the sufficiency of evidence is attacked. Appellate reversal on grounds of insufficient evidence should be "confined to cases where the prosecution's failure is clear." *Burks* v. *United States*, 437 U.S. 1, 17 (1978). Furthermore, "the primary responsibility for reviewing the sufficiency

The court of appeals reversed petitioner's conviction under the Endangered Species Act, because the government relied on hearsay evidence to identify the specific subspecies of peregrine falcon involved, the endangered anatum (Pet. App. A18-A20). McPartlin testified that he identified the birds by the state where they were trapped, but he had no first-hand knowledge of that location (*id.* at A18). In contrast, the Lacey Act count did not require proof of a particular subspecies of falcon. The government had charged the petitioner with possessing and transporting, from Montana to Texas, "two (2) peregrine falcons" which he knew were possessed and transported unlawfully under the laws of Montana (*id.* at A27-A28).[13]

The court of appeals properly considered separately the sufficiency of the evidence to support each count (Pet. App. A10-A20). Cf. *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). The reviewing court also assessed the evidence adduced at trial and determined, as it should, whether it could support a rational determination of guilt beyond a reasonable doubt. *Powell*, 469 U.S. at 67. That the court of appeals upheld one count and reversed another demonstrates its care in reviewing the sufficiency of the evidence.

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of the evidence to support a criminal conviction rests with the Court of Appeals" (*Hamling* v. *United States*, 418 U.S. 87, 124 (1974)).

[13]There is no dispute that the birds purchased by petitioner were indeed peregrine falcons. Photographs of both birds were admitted into evidence (GX's 12, 14). Moreover, the evidence was clearly ample to demonstate petitioner's intent to purchase birds taken from the wild. Petitioner's theory seems to be that, despite this intent, his conviction must be overturned if there was an insufficient showing that the birds were *in fact* taken from the wild. Even if we assume, arguendo, the correctness of petitioner's analysis, that showing was sufficiently made by McPartlin's testimony that he had not raised the birds in captivity, and by the evidence that petitioner affixed the band indicating captive breeding to the passage bird, although captive-bred birds must be banded at two weeks.

2. Petitioner's argument (Pet. 29) that the permits from the State of Montana authorized him to possess and transport the peregrine falcons which he purchased on June 2, 1984, is meritless. Petitioner knew full well that the Montana permits (Pet. App. A30, A31) issued to McPartlin were false. He was told repeatedly by his confederates and McPartlin that the Montana permits were a "cover" to hide the illegal origin of the falcons. Specifically, in three separate telephone conversations McPartlin told Loessberg, and later petitioner himself, that the falcons were coming out of a nest in the wild, that they were not captive-bred and that the sale of wild falcons (regardless of subspecies) is illegal in Montana.[14]

On June 2, 1984, when petitioner arrived in Great Falls to complete the purchase of the falcons and take them back to Texas, he was shown the paperwork "cover," which was part of the scheme to convince the authorities that these falcons were captive-bred birds (Tr. 764). Everyone involved in the scheme, including petitioner, shared the knowledge that these falcons were not captive-bred as the permits stated. Petitioner marked the older bird with a band falsely identifying it as captive-bred (Tr. 367), even as he was again reminded of the illegal nature of these birds under Montana law (Tr. 367-368, 752). The very bird petitioner marked was a full-grown bird, 18 inches tall (Tr. 749) that was described to him as a passage anatum caught the previous winter (Tr. 1280). Petitioner knew it was not an "infant" bird (Tr. 1302). Yet, the Montana permit for this bird described it as bred in captivity during 1984—*i.e.*, an infant. Petitioner, who himself raises falcons (Pet. 34), could plainly see that the bird before him was a much older passage bird, hatched in 1983.

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[14]Petitioner's claim that he believed McPartlin had raised the birds in captivity, despite McPartlin's express statements to the contrary (Pet. 11-14, 32), presented at most an issue of credibility for the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant.Attorney General

DONALD A. CARR
JAMES C. KILBOURNE
ROBERT L. KLARQUIST
JOHN T. WEBB
Attorneys

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